

# **EXHIBIT R**

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Sentence

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
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3 UNITED STATES OF AMERICA,

4 v. 11 Cr. 907 (JSR)

5 RAJAT K. GUPTA,  
6 a/k/a Sealed Defendant 1,

7 Defendant.

8 -----x

9 October 24, 2012  
2:09 p.m.

10 Before:

11 HON. JED S. RAKOFF,

12 District Judge

13

14 APPEARANCES

15 PREET BHARARA,  
United States Attorney for the  
16 Southern District of New York  
RICHARD CRAIG TARLOWE  
17 DAMIAN WILLIAMS,  
Assistant United States Attorneys

18 KRAMER LEVIN NAFTALIS & FRANKEL, LLP,  
Attorneys for defendant Gupta

19 BY: GARY P. NAFTALIS  
20 DAVID S. FRANKEL  
ROBIN MARIE WILCOX  
21 ALAN ROY FRIEDMAN

22 - also present -

23 Andrea Estok, Special Agent, FBI

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1 (Case called)

2 THE CLERK: Will the parties please identify  
3 themselves for the record.

4 MR. TARLOWE: Good afternoon, your Honor. Richard  
5 Tarlowe and Damian Williams for the government.

6 Also seated at counsel table is Special Agent Andrea  
7 Estok of the FBI.

8 THE COURT: Good afternoon.

9 MR. NAFTALIS: Good afternoon, your Honor. Gary  
10 Naftalis and David Frankel for Mr. Gupta.

11 Also at counsel table are Robin Wilcox and Alan  
12 Friedman.

13 THE COURT: Good afternoon.

14 We are here for sentence. Let me first find out from  
15 defense counsel whether the defendant has read and discussed  
16 with counsel the presentence report.

17 MR. FRANKEL: Thank you, your Honor.

18 The answer is yes. We have discussed it with  
19 Mr. Gupta.

20 THE COURT: And are there any objections other than  
21 those in your written sentencing memorandum?

22 MR. FRANKEL: No, your Honor.

23 THE COURT: OK. Any objections from the government?

24 MR. TARLOWE: No, your Honor.

25 THE COURT: All right. So although the Probation

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1 Officer recommends a nonguideline sentence, the first  
2 requirement of the Court is to calculate what the guidelines  
3 are. So the Probation Officer, and joined in by the  
4 government, has calculated a guideline range of a total offense  
5 level 30, Criminal History Category I, and a guideline range of  
6 97 to 121 months in prison.

7 The defendant, in his written memoranda, asks for a  
8 much lower guideline range.

9 Let me hear first from defense counsel, then from  
10 government counsel.

11 MR. FRANKEL: Thank you, your Honor.

12 I guess I should first say that, as your Honor is  
13 aware from the submissions, what is not in dispute is, of  
14 course, that it is the insider trading guideline 2B1.4 which  
15 applies, which has a base level of 8. And we do not dispute  
16 the enhancement under 3B1.3, which is the abuse of position of  
17 trust, which adds two levels, for a total of 10.

18 As your Honor is also aware from the submissions, the  
19 very substantial disagreement between us and the government has  
20 to do with the -- for starters, the definition of gain, which  
21 we believe -- and the definition of gain is in the background  
22 comment to 2B1.4, where gain is defined as the gain resulting  
23 from the offense is, quote, the total increase in value  
24 realized through trading securities by the defendant.

25 In the Rajaratnam sentencing, Judge Holwell concluded

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1 that --

2 THE COURT: Mr. Frankel, I am anxious to hear anything  
3 you have to say but I've read your memorandum, so, really, I  
4 know your basic position and you don't have to take me through  
5 nit by nit your entire theory.

6 MR. FRANKEL: Is there an aspect of it that your Honor  
7 would like me to focus on in particular?

8 THE COURT: Well, I think the most interesting  
9 question is, assuming arguendo that the Court agrees with you  
10 that the relevant trades are the September and October 2008  
11 trades and assuming that the gain in the September trades is  
12 relatively easily calculated, the issue -- one of the issues  
13 you present is the time lapse that's presented in the  
14 calculation of the loss avoided in the October trades.

15 Basically what happened was Mr. Gupta tipped  
16 Mr. Rajaratnam that Goldman's third-quarter results were going  
17 to be a lot less favorable than was perceived, and he went out  
18 and sold the next day a lot of shares of Goldman, Sachs. But  
19 the government says that the loss avoided thereby should be  
20 viewed in terms of when the Goldman results for the third  
21 quarter were actually made public, which was in December.

22 So that's the issue that I think I would be happy to  
23 hear whatever you have to say about that issue.

24 MR. FRANKEL: Your Honor, as the government  
25 acknowledges in its submission, the Court's role with respect

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1 to calculating in this case loss avoided is to find a  
2 reasonable estimate of the loss avoided. And what we are  
3 saying -- and, again, I won't rehearse all of the details of  
4 the argument, but, obviously, what we're saying is that it is  
5 unrealistic and unreasonable to assume -- and it really is  
6 simply an assumption, a speculation -- that Rajaratnam would  
7 have held onto those shares up to the date -- the time of the  
8 disclosure of Goldman's earnings on December 17th, and that a  
9 much more reasonable and realistic conclusion, that the Court  
10 is permitted to draw based on the evidence, is that he would  
11 have sold those shares and we've chosen a date which we think  
12 is based on a reason, that it is a rational choice of a date,  
13 which is to say October 31, which, as your Honor knows, we've  
14 highlighted --

15 THE COURT: No. No. He sold the shares, did he not,  
16 on October 24th? The question is what is the figure, the share  
17 price for the date when you should say this was the loss he  
18 avoided by selling when he did.

19 MR. FRANKEL: And I may have misspoken because what I  
20 meant to say, if I am understanding the analysis correctly, is  
21 that in the absence of the inside information --

22 THE COURT: I see. You think he would have sold it  
23 anyway for other reasons before December, whatever the date  
24 was.

25 MR. FRANKEL: Yes.

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1 There is also in some of the information presented to the Court  
2 under seal an implicit suggestion that, after so many years of  
3 assuming the role of father to all, Gupta may have longed to  
4 escape the straitjacket of overwhelming responsibility, and had  
5 begun to loosen his self-restraint in ways that clouded his  
6 judgment. But whatever was operating in the recesses of his  
7 brain, there is no doubt that Gupta, though not immediately  
8 profiting from tipping Rajaratnam, viewed it as an avenue to  
9 future benefits, opportunities, and even excitement. Thus, by  
10 any measure, Gupta's criminal acts represented the very  
11 antithesis of the values he had previously embodied.

12 So how does a court balance these polar extremes? In  
13 arguing for a non-guideline sentence in the presentence report,  
14 the experienced Senior U.S. Probation Officer Emily Frankelis  
15 had this to say: "We believe the defendant's commission of the  
16 instant offenses was aberrant behavior - not aberrant as  
17 defined by the U.S. Sentencing Guidelines, but rather as  
18 defined by Merriam-Webster: '. . . Atypical.'" The Court  
19 agrees, and finds that the aberrant nature of Mr. Gupta's  
20 conduct by itself would warrant a non-guideline sentence, even  
21 aside from the other factors favoring leniency. But in order  
22 to find just the right sentence, the Court must also consider  
23 two further mandates of Section 3553(a): First, "the need for  
24 the sentence imposed" to afford specific deterrence, general  
25 deterrence, "just punishment," and the like; and, second, the

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1 requirement that any sentence imposed be "sufficient, but not  
2 greater than necessary, to comply with [these] purposes."

3 As to specific deterrence, it seems obvious that,  
4 having suffered such a blow to his reputation, Mr. Gupta is  
5 unlikely to repeat his transgressions, and no further  
6 punishment is needed to achieve this result. General  
7 deterrence, however, suggests a different conclusion. As this  
8 Court has repeatedly noted in other cases, insider trading is  
9 an easy crime to commit but a difficult crime to catch. Others  
10 similarly situated to the defendant must therefore be made to  
11 understand that when you get caught, you will go to jail.  
12 Defendant's proposals to have Mr. Gupta undertake various  
13 innovative forms of community service would, in this Court's  
14 view, totally fail to send this message. Moreover, if the  
15 reports of Mr. Gupta's charitable endeavors are at all  
16 accurate, he can be counted on to devote himself to community  
17 service when he finishes any prison term, regardless of any  
18 order of the Court.

19 At the same time, no one really knows how much jail  
20 time is necessary to materially deter insider trading; but  
21 common sense suggests that most business executives fear even a  
22 modest prison term to a degree that more hardened types might  
23 not. Thus, a relatively modest prison term should be  
24 "sufficient, but not more than necessary," for this purpose.

25 There are, however, still other factors set forth in



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1 Section 3553(a) that the Court must, and has, considered, of  
2 which perhaps the most difficult, but most important one, is  
3 the concept of "just punishment." While all the other factors  
4 under Section 3553 partake to a lesser or greater degree of  
5 policy considerations, "just punishment" taps a deeper vein.  
6 Human beings, as social animals, are programmed to respect  
7 moral values. This is why people without shame or guilt are  
8 considered psychopaths, and also why violation of the moral  
9 order raise such deep passions in the human breast. As people  
10 have come to understand that insider trading is not only a  
11 sophisticated form of cheating but also a fundamental breach of  
12 trust and confidence, they have increasingly internalized their  
13 revulsion for its commission. While no defendant should be  
14 made a martyr to public passion, meaningful punishment is still  
15 necessary to reaffirm society's deep-seated need to see justice  
16 triumphant. No sentence of probation, or anything close to it,  
17 could serve this purpose.

18 After carefully weighing all these, and other,  
19 relevant factors, the Court concludes that the sentence that  
20 most fulfills all the requirements of Section 3553(a) is two  
21 years in prison. Rajat K. Gupta is therefore sentenced to 24  
22 months' imprisonment, concurrent on all counts, to be followed  
23 by one year of supervised release, on the terms stated from the  
24 bench and here incorporated by reference. The otherwise  
25 mandatory forfeiture has been waived by the government, but the